

## Remarks

Claims 1 - 14 and 21 - 25 remain in the application, and claims 15 - 20 were previously cancelled. This transmittal is presented in response to the sixth office action and is believed to completely resolve each issue as raised by the examiner. For convenience in examining the application, the applicants include herewith reference copies of US patents 676,924, 6,530,815, 6,595,822, 6,638,131, and 6,857,928. Applicants believe the claims to be non-obvious and patentably distinct from all prior art.

### **OA Item #1: Claims Rejection under 35 USC § 103(a) - Obviousness:**

The examiner has rejected claims 1 - 14 and 21 - 25 under 35 USC § 103(a) based on Price (3,840,678), as further evidenced by Hunter (GB'356), Williams ('174), Schramm ('046), Martindale ('797), Kennedy ('390), Beutlich et al. (GB'581), McCombs ('714), Meth ('599), Patterson ('975), Corteggiani et al (FR'917), Pilot Ink (JP'388), and McCaffery ('164), in view of Product Alert (3/23/98), as further evidenced by Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse (3/27/03), exhibits labeled A-H, Baker (WO 00/19803), Coleman ('884), and Hoeting et al ('870). The examiner has also rejected claims 1 - 14 and 21 - 25 under 35 USC § 103(a) based on Product Alert (3/23/98), as further evidenced by Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse (3/27/03), exhibits labeled A-H, Baker (WO 00/19803), ('046), in view of Price (3,840,678), as further evidenced by Hunter (GB'356), Williams ('174), Schramm ('046), Martindale ('797), Kennedy ('390), Beutlich et al. (GB'581), McCombs ('714), Meth ('599), Patterson ('975), Corteggiani et al (FR'917), Pilot Ink (JP'388), and McCaffery ('164). The applicants respectfully traverse the examiner's rejection on the basis that the applicant's invention in the appended claims is substantially different than the cited prior art patents and on the basis of negative teachings by the cited patents. The applicants also respectfully point out that applicants' application, having a filing date of November 06, 2000, antedates the Candy Warehouse (3/27/03) reference. The applicants therefore respectfully suggest that the Candy Warehouse (3/27/03) reference should not be considered to be prior art.

**Substantially Different:** The applicants urge that the teachings of Price ('678), Product Alert (3/23/98), '174, '046 and '131, as well as all of the other cited prior art, are far removed from that of the invention claimed by the applicants. The '678 patent is directed towards "fluid food" in combination with a breadstick spoon and a "non-spill cup". Further, aside from generically citing "fluid food" (i.e. the fluid food into which the non-fluid food is dipped), the only food specifically identified in '678 is "hamburgers, sandwiches, and bread sticks". Such foods would ordinarily be considered "food", such as that food which is consumed as a meal and to provide nourishment. While food in general and candy in particular both define edible matter, the applicants respectfully suggest that candy, the subject of the applicant's application, does not define "food" in the general term, and is distinct from and definable over the "hamburgers, sandwiches, and bread sticks" of Price or from the liquid food into which the "hamburgers, sandwiches, and bread sticks" would be dipped (i.e. catsup, mustard, mayonnaise, etc.). The applicants respectfully suggest that an ordinary person would not sit down to a meal of sour candy granules nor would the person consider the same to be "food". The applicants further respectfully suggest that an ordinary person would not dip "hamburgers, sandwiches, and breadsticks" into candy powder, candy beads, candy liquid, or the like. The applicants therefore respectfully suggest that there would not have been the motivation to combine the references as required by the examiner's assertion of obviousness. Furthermore, even if candy were to be considered a food, which the applicants do not consider to be the case, '678 did not contemplate or teach such sub-category of food (i.e. candy) in combination with the "non-spill" cup.

Applicants note that '046 and '131 were directed toward resisting the spillage of liquid bubble solution whereas applicants' current application is directed towards resisting the spillage of candy powder or candy beads or the like while having an open container access so as to be able to coat a lollipop type confection with the candy powder or candy beads. The applicants have not and do not claim to be the inventors of a mere lollipop, a mere container with a funnel, or a mere (spillable) container of candy powder in combination with a lollipop. The applicants respectfully point out that the product alert and like references, functionally similar to Coleman ('884), Hoeting et al ('870), Impact Confections' "Lollipop Paintshop" and other references that the applicants disclosed in their November 6, 2000 information disclosure statement, merely confirm the applicants' assertion of the long felt need

for a solution to the problem of spillage of flowable candy, especially flowable candy contained in a container that is combined with a lollipop. The successful creation of a product that allows the user to readily coat a lollipop type confection with candy powder or the like without having the burden of opening and closing a lid or performing some other cumbersome process to provide for spill resistance of the flowable candy contained therein, creates a heretofore unknown and non-obvious product.

It is also respectfully pointed out that the difference between the prior patents and the current application is greater than merely a recitation that the container now contains edible matter. The examiner states that, "the differences are substantially in the content of the container". The applicants agree that there are substantial differences in the contents of the current inventive container and the containers of the previous inventions. The applicants urge that such difference in container contents contributes to the patentability of the subject invention. While the examiner may not perceive the container contents as contributing to patentability and non-obviousness, clearly, this is not a position universally held by the office. To confirm this, one need look no further than the applicants' own cited prior invention. US patent application 09/287,798, which is directed to a spill proof Easter egg coloring container and which during the prosecution of the subject application has matured into US patent 6,386,138, was allowed in part due to the unique matter contained within the container (e.g. an edible egg). See for instance independent claims 10 and 20 of US patent 6,386,138. As additional confirmation, attention is drawn to other art cited in the application. For instance, US 1,254,714 for a spill resistant paint container with a removable brush issued to McCombs, US 3,781,164 for a spill resistant candle container issued to McCaffery, US 3,840,678 for a spill resistant condiment container with a removable breadstick issued to Price, US 5,105,975 for a spill resistant drink container with a removable straw issued to Patterson, US 5,246,046 for a spill resistant bubble solution container with a removable wand issued to Schramm, US 5,758,797 for a spill resistant fingerprint powder container issued to Martindale, and US 6,386,138 for a spill resistant Easter egg container with a removable utensil issued to Schramm, all differ from one another principally due to the matter spill resistantly contained within their containers. Should the examiner's same standard of obviousness have been applied to the cited art, McCaffery would not have issued due to McCombs, Price would not have issued due to McCaffery, Patterson would not have issued due to Price, Schramm ('046) would not

have issued due to Patterson, Martindale would not have issued due to Schramm ('046), and Schramm ('138) would not have issued due to Martindale. Furthermore, none of McCombs, McCaffery, Price, Patterson, Schramm ('046), Martindale, and Schramm ('138) would have issued due to US 676,924 for a spill resistant spittle container (i.e. spittoon) issued to Steiger. Nevertheless, as can be seen from the cited art, the patents were allowed and were considered to define over their respective predecessors due at least in part to the matter which they respectively spill resistantly contained.

Additionally, applicants note that US patent 6,530,815 to Bro et. al. covering a spill resistant bubble solution container having a impending funnel and a removable bubble wand and US patents 6,595,822, 6,638,131, and 6,857,928, to Thai, covering spill resistant bubble solution containers having impending non-cylindrical funnels and removable bubble wands, were all examined in light of Schramm patent RE36,131 covering a spill resistant bubble solution container having a impending non-cylindrical funnel and a removable bubble wand, and were allowed in spite of RE36,131. Applicants respectfully suggest that the subject matter in the above noted art is far closer to RE36,131 than is applicant's current application directed to containers of spill resistant flowable candy with removable lollipops, and yet the above noted art was considered non-obvious over RE36,131. Inasmuch as the above noted art was considered nonobvious over RE36,131, the applicants respectfully suggest that the current application is even more nonobvious over the art of record.

**Negative Teaching:** The applicants respectfully disagree with the examiner's obviousness rejection and urge that the Coleman and Hoeting art provide negative teachings. The applicants respectfully suggest that the negative teachings needn't be limited to what is claimed but may be found elsewhere in the specification. As noted in the applicants' previous office action responses, both Coleman and Hoeting recognized the problem of spillage of candy particulate and both attempt to address the problem in their respective inventions. Further, the same can be said for the veritable plethora of containers of flowable candy in combination with lollipops - including those shown in the Product Alert references - that are available on the market. Consequently, many manufacturers of such containers of flowable candy include cautionary language on their product packaging to guard against spills. It is also acknowledged that Coleman does provide a candy particulate container having a degree of spill resistivity. However, in as much as Coleman stores the lollipop product outside of the

particulate containing compartment of the container, the container must be opened to access the particulate with the lollipop. By opening the Coleman container, the container is then of course rendered highly spillable much like any open-mouthed conventional container.

In an apparent effort to overcome this loss of spill resistivity, Hoeting redesigned his disclosed invention to place both the lollipop product and the particulate candy within the same "spill resistant" closed container. And as with Coleman, so long as the Hoeting container remains closed, the Hoeting container is spill resistant. And as with Coleman, in order to use the Hoeting container, the Hoeting container must be opened, rendering Hoeting highly spillable. However, in spite of having access to Hunter and Martindale, not only have Coleman and Hoeting put forth edible particulate containers lacking the very funnel that could have solved the recognized problem, Hoeting introduced a new problem. The Hoeting product is analogous to an unassuming person holding a conventional cup of coffee and wearing a wristwatch. When the person is asked what time it is, the person responds by turning his wrist to observe the face of his watch, only to spill his coffee from his cup. Likewise, because Hoeting placed the lollipop inside of the container with the candy particulate, it is a natural tendency for a user of the Hoeting product to spill the candy particulate when rotating the Hoeting container into a position to access the lollipop. Coleman and Hoeting, in spite of Hunter, Martindale, and all other prior art, have taught inventions that do not solve their own recognized problem of spill resistance of accessible particulate candy. The applicants suggest that if their invention was obvious to one having ordinary skill in the art, then inventors such as Coleman and Hoeting who had access to art having containers with funnels, would have solved the problem as the applicants have done. Instead, in spite of the long felt and clearly recognized need, other inventors such as Coleman and Hoeting have not invented the applicants' invention and Coleman and Hoeting have negatively taught spill resistance of particulate candy with conventional non-funneled containers that are in fact highly spillable.

In conclusion, the applicants respectfully suggest that the spill resistant candy container is no more obvious in light of powder containers having funnels and candy powder containers than was the spill resistant bubble solution container in light of bubble solution containers with a version of a funnel and spill resistant liquid containers. Given the substantially different invention, and the negative

teaching, it is urged that an “obvious” rejection is not proper and it is respectfully requested that the examiner withdraw the rejection.

**OA Item #2: Claims 1-14 and 21-25 Rejected under Obvious Type Double Patenting:**

The examiner has rejected claims 1 – 14 and 21 – 25 under obvious type double patenting over claims 1 – 9 of US patent 5,246,046 and claims 1 – 11 of US patent RE36,131 in view of Price (3,840,678), as further evidenced by Hunter (GB‘356), Williams (‘174), Schramm (‘046), Martindale (‘797), Kennedy (‘390), Beutlich et al. (GB‘581), McCombs (‘714), Meth (‘599), Patterson (‘975), Corteggiani et al (FR‘917), Pilot Ink (JP‘388), and McCaffery (‘164), in view of Product Alert (3/23/98), as further evidenced by Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse (3/27/03), exhibits labeled A-H, Baker (WO 00/19803), Coleman (‘884), and Hoeting et al (‘870). The examiner has also rejected claims 1 – 14 and 21 – 25 under obvious type double patenting over claims 1 – 29 of US patent 6,386,138 in view of Price (3,840,678), as further evidenced by Hunter (GB‘356), Williams (‘174), Schramm (‘046), Martindale (‘797), Kennedy (‘390), Beutlich et al. (GB‘581), McCombs (‘714), Meth (‘599), Patterson (‘975), Corteggiani et al (FR‘917), Pilot Ink (JP‘388), and McCaffery (‘164), in view of Product Alert (3/23/98), as further evidenced by Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse (3/27/03), exhibits labeled A-H, Baker (WO 00/19803), Coleman (‘884), and Hoeting et al (‘870). The applicants respectfully traverse the examiner’s rejection on the basis that the applicants’ invention in the appended claims is substantially different than the cited prior art patents and on the basis of negative teachings by the cited patents. The applicants also respectfully point out that applicants’ application, having a filing date of November 06, 2000, antedates the Candy Warehouse (3/27/03) reference. The applicants therefore respectfully suggest that the Candy Warehouse (3/27/03) reference should not be considered to be prior art.

**Substantially Different:** The applicants urge that the teachings of Price (‘678), Product Alert (3/23/98), ‘174, ‘046 and ‘131, as well as all of the other cited prior art, are far removed from that of the invention claimed by the applicants. The ‘678 patent is directed towards “fluid food” in combination with a breadstick spoon and a “non-spill cup”. Further, aside from generically citing “fluid food” (i.e. the fluid food into which the non-fluid food is dipped), the only food specifically identified in ‘678 is

“hamburgers, sandwiches, and bread sticks”. Such foods would ordinarily be considered “food”, such as that food which is consumed as a meal and to provide nourishment. While food in general and candy in particular both define edible matter, the applicants respectfully suggest that candy, the subject of the applicants’ application, does not define “food” in the general term, and is distinct from and definable over the “hamburgers, sandwiches, and bread sticks” of Price or from the liquid food into which the “hamburgers, sandwiches, and bread sticks” would be dipped (i.e. catsup, mustard, mayonnaise, etc.). The applicants respectfully suggest that an ordinary person would not sit down to a meal of sour candy granules nor would the person consider the same to be “food”. The applicants further respectfully suggest that an ordinary person would not dip “hamburgers, sandwiches, and breadsticks” into candy powder, candy beads, candy liquid, or the like. The applicants therefore respectfully suggest that there would not have been the motivation to combine the references as required by the examiner’s assertion of obviousness. Furthermore, even if candy were to be considered a food, which the applicants do not consider to be the case, ‘678 did not contemplate or teach such sub-category of food (i.e. candy) in combination with the “non-spill” cup.

Applicants note that ‘046 and ‘131 were directed toward resisting the spillage of liquid bubble solution whereas applicants’ current application is directed towards resisting the spillage of candy powder or candy beads or the like while having an open container access so as to be able to coat a lollipop type confection with the candy powder or candy beads. The applicants have not and do not claim to be the inventors of a mere lollipop, a mere container with a funnel, or a mere (spillable) container of candy powder in combination with a lollipop. The applicants respectfully point out that the product alert and like references, functionally similar to Coleman (‘884), Hoeting et al (‘870), Impact Confections’ “Lollipop Paintshop” and other references that the applicants disclosed in their November 6, 2000 information disclosure statement, merely confirm the applicants’ assertion of the long felt need for a solution to the problem of spillage of flowable candy, especially flowable candy contained in a container that is combined with a lollipop. The successful creation of a product that allows the user to readily coat a lollipop type confection with candy powder or the like without having the burden of opening and closing a lid or performing some other cumbersome process to provide for spill resistance of the flowable candy contained therein, creates a heretofore unknown and non-obvious product.

It is also respectfully pointed out that the difference between the prior patents and the current application is greater than merely a recitation that the container now contains edible matter. The examiner states that, "the differences are substantially in the content of the container". The applicants agree that there are substantial differences in the contents of the current inventive container and the containers of the previous inventions. The applicants urge that such difference in container contents contributes to the patentability of the subject invention. While the examiner may not perceive the container contents as contributing to patentability and non-obviousness, clearly, this is not a position universally held by the office. To confirm this, one need look no further than the applicant's own cited prior invention. US patent application 09/287,798, which is directed to a spill proof Easter egg coloring container and which during the prosecution of the subject application has matured into US patent 6,386,138, was allowed in part due to the unique matter contained within the container (e.g. an edible egg). See for instance independent claims 10 and 20 of US patent 6,386,138. As additional confirmation, attention is drawn to other art cited in the application. For instance, US 1,254,714 for a spill resistant paint container with a removable brush issued to McCombs, US 3,781,164 for a spill resistant candle container issued to McCaffery, US 3,840,678 for a spill resistant condiment container with a removable breadstick issued to Price, US 5,105,975 for a spill resistant drink container with a removable straw issued to Patterson, US 5,246,046 for a spill resistant bubble solution container with a removable wand issued to Schramm, US 5,758,797 for a spill resistant fingerprint powder container issued to Martindale, and US 6,386,138 for a spill resistant Easter egg container with a removable utensil issued to Schramm, all differ from one another principally due to the matter spill resistantly contained within their containers. Should the examiner's same standard of obviousness have been applied to the cited art, McCaffery would not have issued due to McCombs, Price would not have issued due to McCaffery, Patterson would not have issued due to Price, Schramm ('046) would not have issued due to Patterson, Martindale would not have issued due to Schramm ('046), and Schramm ('138) would not have issued due to Martindale. Furthermore, none of McCombs, McCaffery, Price, Patterson, Schramm ('046), Martindale, and Schramm ('138) would have issued due to US 676,924 for a spill resistant spittle container (i.e. spittoon) issued to Steiger. Nevertheless, as can be seen from the



cited art, the patents were allowed and were considered to define over their respective predecessors due at least in part to the matter which they respectively spill resistantly contained.

Additionally, applicants note that US patent 6,530,815 to Bro et. al. covering a spill resistant bubble solution container having a impending funnel and a removable bubble wand and US patents 6,595,822, 6,638,131, and 6,857,928, to Thai, covering spill resistant bubble solution containers having impending non-cylindrical funnels and removable bubble wands, were all examined in light of Schramm patent RE36,131 covering a spill resistant bubble solution container having a impending non-cylindrical funnel and a removable bubble wand, and were allowed in spite of RE36,131. Applicants respectfully suggest that the subject matter in the above noted art is far closer to RE36,131 than is applicant's current application directed to containers of spill resistant flowable candy with removable lollipops, and yet the above noted art was considered non-obvious over RE36,131. Inasmuch as the above noted art was considered nonobvious over RE36,131, the applicants respectfully suggest that the current application is even more nonobvious over the art of record.

**Negative Teaching:** The applicants respectfully disagree with the examiner's obviousness rejection and urge that the Coleman and Hoeting art provide negative teachings. The applicants respectfully suggest that the negative teachings needn't be limited to what is claimed but may be found elsewhere in the specification. As noted in the applicant's previous office action responses, both Coleman and Hoeting recognized the problem of spillage of candy particulate and both attempt to address the problem in their respective inventions. Further, the same can be said for the veritable plethora of containers of flowable candy in combination with lollipops - including those shown in the Product Alert references - that are available on the market. Consequently, many manufacturers of such containers of flowable candy include cautionary language on their product packaging to guard against spills. It is also acknowledged that Coleman does provide a candy particulate container having a degree of spill resistivity. However, in as much as Coleman stores the lollipop product outside of the particulate containing compartment of the container, the container must be opened to access the particulate with the lollipop. By opening the Coleman container, the container is then of course rendered highly spillable much like any open-mouthed conventional container.

In an apparent effort to overcome this loss of spill resistivity, Hoeting redesigned his disclosed invention to place both the lollipop product and the particulate candy within the same “spill resistant” closed container. And as with Coleman, so long as the Hoeting container remains closed, the Hoeting container is spill resistant. And as with Coleman, in order to use the Hoeting container, the Hoeting container must be opened, rendering Hoeting highly spillable. However, in spite of having access to Hunter and Martindale, not only have Coleman and Hoeting put forth edible particulate containers lacking the very funnel that could have solved the recognized problem, Hoeting introduced a new problem. The Hoeting product is analogous to an unassuming person holding a conventional cup of coffee and wearing a wristwatch. When the person is asked what time it is, the person responds by turning his wrist to observe the face of his watch, only to spill his coffee from his cup. Likewise, because Hoeting placed the lollipop inside of the container with the candy particulate, it is a natural tendency for a user of the Hoeting product to spill the candy particulate when rotating the Hoeting container into a position to access the lollipop. Coleman and Hoeting, in spite of Hunter, Martindale, and all other prior art, have taught inventions that do not solve their own recognized problem of spill resistance of accessible particulate candy. The applicants suggest that if their invention was obvious to one having ordinary skill in the art, then inventors such as Coleman and Hoeting who had access to art having containers with funnels, would have solved the problem as the applicants have done. Instead, in spite of the long felt and clearly recognized need, other inventors such as Coleman and Hoeting have not invented the applicant’s invention and Coleman and Hoeting have negatively taught spill resistance of particulate candy with conventional non-funneled containers that are in fact highly spillable.

In conclusion, the applicants respectfully suggest that the spill resistant candy container is no more obvious in light of powder containers having funnels and candy powder containers than was the spill resistant bubble solution container in light of bubble solution containers with a version of a funnel and spill resistant liquid containers. Given the substantially different invention, and the negative teaching, it is urged that an “obvious” rejection is not proper and it is respectfully requested that the examiner withdraw the rejection.

**OA Item #3: Claims Rejection under 35 USC § 102(e)/103:**

The examiner has rejected claims 1 – 4 and 21 – 25 under 35 USC § 102(e)/103 in view of Price (3,840,678), as further evidenced by Hunter (GB'356), Williams ('174), Schramm ('046), Martindale ('797), Kennedy ('390), Beutlich et al. (GB'581), McCombs ('714), Meth ('599), Patterson ('975), Corteggiani et al (FR'917), Pilot Ink (JP'388), and McCaffery ('164), in view of Product Alert (3/23/98), as further evidenced by Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse (3/27/03), exhibits labeled A-H, Baker (WO 00/19803), Coleman ('884), and Hoeting et al ('870) or Product Alert (3/23/98), as further evidenced by Product Alert (8/9/99, part 1), Product Alert (8/9/99, part 2), Candy Warehouse (3/27/03), exhibits labeled A-H, Baker (WO 00/19803), ('046), in view of Price (3,840,678), as further evidenced by Hunter (GB'356), Williams ('174), Schramm ('046), Martindale ('797), Kennedy ('390), Beutlich et al. (GB'581), McCombs ('714), Meth ('599), Patterson ('975), Corteggiani et al (FR'917), Pilot Ink (JP'388), and McCaffery ('164). The applicants respectfully traverse the examiner's rejection on the basis that the applicants' invention in the appended claims is substantially different than the cited prior art patents and on the basis of negative teachings by the cited patents. The applicants also respectfully point out that applicants' application, having a filing date of November 06, 2000, antedates the Candy Warehouse (3/27/03) reference. The applicants therefore respectfully suggest that the Candy Warehouse (3/27/03) reference should not be considered to be prior art.

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The applicants respectfully suggest that an ordinary person would not sit down to a meal of sour candy granules nor would the person consider the same to be "food". The applicants further respectfully suggest that an ordinary person would not dip "hamburgers, sandwiches, and breadsticks" into candy powder, candy beads, candy liquid, or the like. The applicants therefore respectfully suggest that there would not have been the motivation to combine the references as required by the examiner's assertion of obviousness. Furthermore, even if candy were to be considered a food, which the applicant's do not consider to be the case, '678 did not contemplate or teach such sub-category of food (i.e. candy) in combination with the "non-spill" cup.

Applicants note that '046 and '131 were directed toward resisting the spillage of liquid bubble solution whereas applicants' current application is directed towards resisting the spillage of candy powder or candy beads or the like while having an open container access so as to be able to coat a lollipop type confection with the candy powder or candy beads. The applicants have not and do not claim to be the inventors of a mere lollipop, a mere container with a funnel, or a mere (spillable) container of candy powder in combination with a lollipop. The applicants respectfully point out that the product alert and like references, functionally similar to Coleman ('884), Hoeting et al ('870), Impact Confections' "Lollipop Paintshop" and other references that the applicants disclosed in their November 6, 2000 information disclosure statement, merely confirm the applicants' assertion of the long felt need for a solution to the problem of spillage of flowable candy, especially flowable candy contained in a container that is combined with a lollipop. The successful creation of a product that allows the user to readily coat a lollipop type confection with candy powder or the like without having the burden of opening and closing a lid or performing some other cumbersome process to provide for spill resistance of the flowable candy contained therein, creates a heretofore unknown and non-obvious product.

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Additionally, applicants note that US patent 6,530,815 to Bro et. al. covering a spill resistant bubble solution container having a impending funnel and a removable bubble wand and US patents 6,595,822, 6,638,131, and 6,857,928, to Thai, covering spill resistant bubble solution containers having impending non-cylindrical funnels and removable bubble wands, were all examined in light of Schramm patent RE36,131 covering a spill resistant bubble solution container having a impending non-cylindrical

funnel and a removable bubble wand, and were allowed in spite of RE36,131. Applicants respectfully suggest that the subject matter in the above noted art is far closer to RE36,131 than is applicant's current application directed to containers of spill resistant flowable candy with removable lollipops, and yet the above noted art was considered non-obvious over RE36,131. Inasmuch as the above noted art was considered nonobvious over RE36,131, the applicants respectfully suggest that the current application is even more nonobvious over the art of record.

**Negative Teaching:** The applicants respectfully disagree with the examiner's obviousness rejection and urge that the Coleman and Hoeting art provide negative teachings. The applicants respectfully suggest that the negative teaches needn't be limited to what is claimed but may be found elsewhere in the specification. As noted in the applicants' previous office action responses, both Coleman and Hoeting recognized the problem of spillage of candy particulate and both attempt to address the problem in their respective inventions. Further, the same can be said for the veritable plethora of containers of flowable candy in combination with lollipops - including those shown in the Product Alert references - that are available on the market. Consequently, many manufacturers of such containers of flowable candy include cautionary language on their product packaging to guard against spills. It is also acknowledged that Coleman does provide a candy particulate container having a degree of spill resistivity. However, in as much as Coleman stores the lollipop product outside of the particulate containing compartment of the container, the container must be opened to access the particulate with the lollipop. By opening the Coleman container, the container is then of course rendered highly spillable much like any open-mouthed conventional container.

In an apparent effort to overcome this loss of spill resistivity, Hoeting redesigned his disclosed invention to place both the lollipop product and the particulate candy within the same "spill resistant" closed container. And as with Coleman, so long as the Hoeting container remains closed, the Hoeting container is spill resistant. And as with Coleman, in order to use the Hoeting container, the Hoeting container must be opened, rendering Hoeting highly spillable. However, in spite of having access to Hunter and Martindale, not only have Coleman and Hoeting put forth edible particulate containers lacking the very funnel that could have solved the recognized problem, Hoeting introduced a new problem. The Hoeting product is analogous to an unassuming person holding a conventional cup of

coffee and wearing a wristwatch. When the person is asked what time it is, the person responds by turning his wrist to observe the face of his watch, only to spill his coffee from his cup. Likewise, because Hoeting placed the lollipop inside of the container with the candy particulate, it is a natural tendency for a user of the Hoeting product to spill the candy particulate when rotating the Hoeting container into a position to access the lollipop. Coleman and Hoeting, in spite of Hunter, Martindale, and all other prior art, have taught inventions that do not solve their own recognized problem of spill resistance of accessible particulate candy. The applicants suggest that if their invention was obvious to one having ordinary skill in the art, then inventors such as Coleman and Hoeting who had access to art having containers with funnels, would have solved the problem as the applicants have done. Instead, in spite of the long felt and clearly recognized need, other inventors such as Coleman and Hoeting have not invented the applicant's invention and Coleman and Hoeting have negatively taught spill resistance of particulate candy with conventional non-funneled containers that are in fact highly spillable.

In conclusion, the applicants respectfully suggest that the spill resistant candy container is no more obvious in light of powder containers having funnels and candy powder containers than was the spill resistant bubble solution container in light of bubble solution containers with a version of a funnel and spill resistant liquid containers. Given the substantially different invention, and the negative teaching, it is urged that an "obvious" rejection is not proper and it is respectfully requested that the examiner withdraw the rejection.

**OA Item #4: Claims 1-14 Rejected under 35 USC § 112, 1<sup>st</sup> para - new matter:**

The examiner has rejected claims 1 – 14 under 35 USC § 112, first paragraph, arguing that the use of the phrase "flowable" constitutes new matter. The applicants respectfully disagree with and traverse the examiner's rejection. Although applicants' reasons are fully set forth in a previous office action response, to assure applicants' position is clearly understood, applicants reassert their position in this office action response.

In his rejection, the examiner asserts that, "As disclosed, the applicant's sole disclosure of the candy material in the container is either the lollipop or a solid particulate material". The applicants respectfully point out that such assertion is not correct. In the applicants' original disclosure, the

applicants for instance also described the material contained in the container as “particulate candy”, “free flowing edible particulate matter”, “flavored candy powder”, “candy beads”, “other particulate type edible matter”, and “edible particulate candy”.

In his rejection, the examiner asserts that, “The phrase edible flowable candy substance is readable on liquids, which are not disclosed as originally filed”. Applicants respectfully suggest that the examiner has inappropriately applied a new matter rejection. For new matter to exist, an applicant must add something to the specification, especially to the claims, that is not supported by an applicants’ original disclosure. In the current application, there is no matter that does not find support in the applicants’ original disclosure. For instance, the term “flowable” finds support in the original disclosure by virtue of the description of the candy powder that is described as being contained in the container regardless of the orientation of the container due to the candy powder “flowing” to the lower side of the container. Inasmuch as the disclosed candy powder exhibits the property of flow, the candy powder is a “flowable” substance. However, the examiner asserts that new matter exists in applicants’ application not because there was not support for the matter in the original disclosure, but rather because applicants’ claim language, in addition to describing matter disclosed in applicants’ disclosure, may also describe matter that was not specifically disclosed in applicants’ original disclosure. The applicants respectfully suggest that such determination is wrong. That applicants’ claim language may also describe matter not specifically disclosed in applicants’ original disclosure is of no consequence so long as applicants’ claim language is supported by applicants’ original disclosure. Such type of claiming has been and is the hallmark of rigorous patent prosecution. The US patent office’s files are replete with issued patents that include claims having claim language broad enough to not only cover subject matter specifically disclosed in their respective specifications, but also broad enough to cover subject matter not specifically disclosed in their respective specifications. Should for instance the examiner’s test method for new matter determination have been applied to all issued patents, it is likely that a large majority of them would stand rejected (inappropriately) due to new matter. Having pointed out the error in rejection, the applicants respectfully request that the examiner withdraw the new matter rejection.



**Conclusion:**

Applicants submit that the arguments presented herein have established the claims to be in condition for allowance. Action in accordance therewith is earnestly solicited.

If the examiner has any questions or comments which may be resolved over the telephone, he is requested to call Michael R. Schramm at 801-710-7793, 801-625-9268, or 435-734-2599 (hm).

DATE: March 4, 2006

Respectfully submitted,

  
Vivian A. Schramm

  
Michael R. Schramm